United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7267

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

NEW ENGLAND TELEPHONE & TELEGRAPH COMPANY,

Plaintiff-Appellee

v.

CENTRAL VERMONT PUBLIC SERVICE CORP.,
and RUTLAND CABLE TV, INC.,

Defendants,

CENTRAL VERMONT PUBLIC SERVICE CORP.,

Defendant-Appellant

BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT.

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NEW ENGLAND TELEPHONE & TELEGRAPH COMPANY,

Plaintiff-Appellee

V.

CENTRAL VERMONT PUBLIC SERVICE CORPORATION,

Defendant-Appellant

STATEMENT OF THE CASE

This case has had a somewhat long and convoluted history, much of it immaterial to the issues raised in this appeal. Briefly put, as a result of an action for personal injuries brought by David Sharp, an employee of Central Vermont Public Services Corp. (CV), against Osmose Wood Preserving Company of America, Inc., and New England Telephone & Telegraph Company (Telco), commenced on January 21, 1972. Telco brought a third-party action against CV and Rutland Cable TV, Inc. (Cable TV), on August 28, 1972, alleging, among other things,

that CV was contractually responsible to indemnify Telco for damages it might be obligated to pay David Sharp. By motion dated April 1973, CV moved, among other things, for judgment on the pleadings. In an opinion and order dated August 2, 1973, the then presiding judge, Honorable James S. Holden, Chief Judge, narrowed the issues between Telco and CV as follows:

> If trial of the main action establishes liability on the part of NET to the plaintiff Sharp, the third party action will proceed to trial on the issues of CV's liability to indemnify NET under Article XIII of the Joint Use Agreement of 1929.

App. 18 .

Subsequently, on February 14, 1974, the principal action brought by David Sharp was dismissed by Order of Chief Judge Holden, the Court having been advised that a settlement had been reached. The settlement terms are reflected in a Covenant-Not-To-Sue. App. 20-22 . The trial of the instant action was predicated on an amended third-party complaint, alleging, among other things, an express indemnification theory of recovery. In that action, CV was permitted to assert a counterclaim against Telco to recover workmen's compensation paid to David Sharp and to recover attorneys' fees and other expenses of litigation.

This is an appeal from a judgment of the United States District Court for the District of Vermont, Honorable James L. Oakes, C.J., presiding, after a trial to court of the indemnity action by Telco against CV and Cable TV. The judgment was in favor of Telco against CV in the amount of $70,000 plus interest and costs.

The District Court's opinion included an order dismissing the complaint against Cable TV, which order is not a subject of this appeal. Subsequent to the

lower Court's opinion, CV's counterclaim against Telco for Workmen's Compensation payments and attorneys' fees was dismissed. This order is appealed from only insofar as CV's claim for attorney's fees and expenses are concerned.

STATEMENT OF FACTS

Since many of the issues raised and decided in the proceedings below are not controverted by CV in this appeal and many of the factual circumstances are, therefore, not relevant, CV shall set forth, in relevant part, the facts of the case in the words of the trial judge.

> David Sharp, an employee of Central Vermont Public Service Corp. (CV), was seriously injured on February 16, 1970, while in the process of doing his work as a third class lineman for CV on a pole owned by New England Telephone & Telegraph Co. (Telco) as a result of the pole's falling. Having climbed the pole, hereinafter designated as X-1, he was pulling up a de-energized primary line being strung from Pole X-1 to a Pole 17 . . . . Pole X-1 contained near the ground line interior rot which was not visible nor readily detectable either by the eye or by a person with David Sharp's experience using his company-prescribed sounding test, i.e., hitting the pole several times with a wrench or hammer at or near the ground line. Pole X-1 was owned by Telco. Although not using the pole Telco as owner was required under contract to maintain and inspect it. The pole was used by CV and had one Rutland Cable TV (Cable TV) attachment. . . .
>
> * * *
>
> As the result of [a] transfer of ownership, under [an] agreement between Telco and CV dated April 1, 1929, relative to the joint use of wood poles located in the Rutland telephone exchange area, . . . Telco and CV each assumed certain obligations or duties. . . .
>
> . . .[O]ne is the duty of Telco to "maintain [Pole X-1] . . . in a safe and serviceable condition, and in accordance with [certain specifications] . . . and [to] replace . . . such of said poles as become defective."
>
> . . . Telco breached this duty because Pole X-1 was not in a safe and serviceable condition and was at the time of the accident defective.
>
> . . . In so doing, there is no evidence in this record, however, that Telco was negligent since the pole was not due for inspection and ground treatment until 1975 under the

ordinary and regular procedures used by utility companies in New England.1/

1/ There was evidence in the record, however, tending to show that periods at which poles were inspected by Telco or its agents were set with economic considerations in mind, and, consequently, safety considerations were thereby compromised. Mr. Rice, the District Instruction Manager in Vermont for Telco, testified in this respect as follows:

Q. Does your company have a procedure for the period inspection of its poles?
A. Yes.
Q. Tell us as to that procedure, Mr. Rice.
A. We inspect our poles on a 20 year cycle from first inspection after they're set, and ten years thereafter. Now, in that 20 year cycle, of course, we can make a decision as to whether we would inspect in that area, the poles that would come up before the next ten years. We'd go through that area or we may not, based on some economic things that might be available to us. So we wouldn't have to make another trip through there.
Q. Prior reference was made to Bell system practice and excerpt from Bell system was introduced by Mr. Dinse, and it had some reference to 11 - 20 year program. What's the significance of that to the company's regular inspection program?
A. If you decided on the 20 year cycle, you were going through an area, or on the tenth year cycle, but on the 20 year cycle you can pick up poles that were going to become 20 years old before the next ten year cycle. Therefore, you could in realty, looking at poles that had more than nine years to go. So it would be an 11 year old pole.
Q. Is that a function of economics?
A. Yes. At the time, how many poles do you want to look at. You know, what's your budget and whether you can afford to look at that many poles.

Transcript 210-211, 220-21 (direct). (Emphasis added.)

Q. Now, the inspection business is 20, this 20 year cycle that you referred to, there isn't real magic in the 20 year business, is there?
A. Only that through experience that this is the time you ought to look at a pole to treat it so that it will last longer and have a longer life to it. And it is the time when some rot gets in there. But we don't expect all we're actually going there to treat them so they'll last longer if they require treatment.

. . . Moreover, although the pole was defective, so long as the head guy and conductors from X-1 were maintained in place, the pole in all probability would not have fallen.

* * *

. . . By not using pike poles and by not temporarily guying the pole in issue in accordance with its own safety regulations, CV was negligent.

* * *

. . . The pole could have been stabilized by securing it to the truck boom.

. . . In short, extra precautions before climbing the pole were required because there had to have been doubt as to the condition of the pole below ground, both because the age of the pole was evident from the degree of weathering and numerous spur marks and also because the ground was frozen.

* * *

. . . CV paid David Sharp temporary total disability payments of $8,000 including medical and hospital payments under its

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Q. It's true, is it not, that some poles for various reasons go bad, so to speak, short of 20 years.
A. That's right.
Q. And that perhaps to use the same words that Mr. Pierson used, it's a matter of economics, really, that you chose a 20 year cycle, is that correct?
A. That's right, so to extend the life of that pole.
Q. Obviously, you would be even safer if you inspected every five years or every ten years, wouldn't it?
A. Well, yes, I presume if there was a condition in the pole that came earlier you would find it at that time.
Q. If there was a pole that went bad short of the 20 years, in your inspection cycle unrelated to economics was shorter than that, you'd find them shorter.
A. Naturally.

Transcript 252-53 (cross) (Emphasis added.)

> own self-insured Workmen's Compensation responsibility; in all probability a claim for permanent disability will be filed and paid but in an amount unascertainable and purely speculative at the present time.
>
> . . . CV reasonably paid $7,250 in services and expenses to Messrs. Dinse, Allen & Erdmann for their legal work in connection with this case consisting of in excess of 200 hours at a rate of approximately $35 per hour.
>
> . . . Telco reasonably paid $20,000 of attorneys fees and disbursements to Messrs. Pierson and Wadhams for their legal services at the rate of $40 per hour for approximately 500 hours of services in connection with the defense of David Sharp's original suit against Telco and the preparation of this indemnity suit and defense of the CV counterclaim.
>
> * * *

App. 23-31.

Central to the outcome of this controversy was an agreement, dated April 1, 1929, between CV and Telco (hereinafter 1929 agreement) which contained indemnification provisions specifying allocation of liability for damages under varying circumstances.

> 1. Each party shall be liable for all damages for such injuries to persons . . . caused solely by its negligence or solely by its failure to comply at any time with the specifications herein provided for . . . .
>
> 2. Each party shall be liable for all damages for such injuries to its own employees . . . that are caused by the concurrent negligence of both parties hereto or that are due to causes which cannot be traced to the sole negligence of the other party.
>
> 3. Each party shall be liable for one-half (1/2) of all damages for such injuries to persons other than employees of either party . . . that are caused by the concurrent negligence of both parties hereto or that are due to causes which cannot be traced to the sole negligence of the other party.

4. Where, on account of injuries of the character described in the preceding paragraphs of this article, either party shall make any payments to injured employees . . . in conformity with . . . the provision of any workmen's compensation act . . . whether based on negligence on the part of the employer or not . . . such payments shall be construed to be damages within the terms of the preceding paragraphs numbered 1 and 2 and shall be paid by the parties hereto accordingly.

* * *

6. In the adjustment between the parties hereto of any claim for damages arising hereunder, the liability assumed hereunder, by the parties shall include, in addition to the amounts paid to the claimant, all expenses incurred by the parties in connection therewith, which shall comprise costs, attorneys' fees, disbursements and other proper charges and expenditures.

* * *

App. 11-12.

ISSUES

I. Does paragraph 4 of Article XIII of the 1929 contract limit the amount of indemnity to workmen's compensation payments under the circumstances of this case?

II. Should this Court conclude that CV was legally obligated to indemnify Telco for the full amount of the damages paid David Sharp, is CV entitled to a set-off of workmen's compensation payments?

POINT I

TELCO IS NOT ENTITLED TO INDEMNITY UNDER THE 1929 AGREEMENT

Put in simple fashion, Telco has prevailed in this action on a theory of express indemnity for damages caused by its breach of a contract with CV for which breach CV's employee sought and received damages as a third-party beneficiary. It seems ironic that Telco's breach of contract with CV has led to a judgment against CV in favor of Telco. Ordinarily, one would expect the result to be exactly the opposite.

Just why Telco should escape liability and CV lose its protection as a workmen's compensation insurer under these circumstances is hard to fathom given the 1929 contract in dispute and the workmen's compensation law then in existence.

Stating that the Vermont Supreme Court has always construed Vermont's Workmen's Compensation statute in case of ambiguity to favor an injured employee, the District Court concluded it would "seem better" to construe an ambiguous indemnification agreement "to place responsibility on the ultimate wrongdoer, at least so far as fault was concerned." App. 35-36 . Judge Oakes held that CV was at fault ("active") because the foreman on the job did not take additional precautions before a co-employee, David Sharp, climbed and worked on the pole that collapsed. Judge Oakes, also, concluded that Telco was at fault ("passive") for not inspecting, maintaining and replacing a defective pole, but expressed this "fault" in terms of breach of contract and found Telco was not negligent. Such a differentiation of fault as being "active" (CV) and "passive" (Telco), however, should be wholly immaterial to the

outcome of this case. 2/

First, the express indemnity provisions of the 1929 contract govern the liability of Telco vis a vis CV, not common law theories of contribution or indemnity. See, e.g., Pennsylvania R. R. Co. v. Erie Avenue Warehouse Co., 192 F. Supp. 471 (D.C. Pa. 1961); Booth-Kelly Lumber Co. v. Southern Pacific Co., 183 F.2d 902 (9th Cir. 1950).

Second, the Court's interpretation of the 1929 contract is res judicata in any possible future indemnity dispute between the parties. In such a case, it is easily conceivable that the equities may be reversed (Telco's negligence being active and CV's fault passive), in which case Telco may be the "ultimate wrongdoer" and, yet, CV shall have to indemnify Telco on the basis of the holding in this case.

The District Court's opinion predicates its holding on an indemnity provision of a 1929 contract between Telco and CV, which in pertinent part reads as follows:

2/ This expression of a dichotomy between breaches of its duties in this case (Telco's being passive because it failed to do something it should have done and CV's active because its omission was "more proximate," App. 33) is a use of sematics which bears little relationship to the realty of the situation. The situation was this: Telco, whose express duty it was to inspect and maintain the pole, had not done so. CV, whose duty it was to take extra precautions before its lineman climbed the pole, had not done so. Both breaches of duty were errors of omission and can only be deemed "passive" whatever materiality that elusive concept may have with this case. For an application of the "active-passive" fault concept where the situation was reversed in contrast to the findings in the case at bar, see Noto v. Pico Peak Corp., 469 F.2d 358, 360-361 (2d Cir. 1972).

> 1. Each party shall be liable for all damages for such injuries to persons . . . caused solely by its negligence or solely by its failure to comply at any time with the specifications herein provided for . . .
>
> 2. Each party shall be liable for all damages for such injuries to its own employees . . . that are caused by the concurrent negligence of both parties hereto or that are due to causes which cannot be traced to the sole negligence of the other party.

App. 11 .

At the time these clauses were drafted, and agreed to, there existed in Vermont a workmen's compensation statute similar to the one now in effect except that, in 1929, acceptance of benefits by the employee was a bar to a suit against anyone, including third parties. The employer, however, by way of subrogation, could sue and recover against a third-party wrongdoer, provided, however, that,

> [i]f the employer recovers from such other person damages in excess of the compensation already paid or awarded to be paid under the provisions of this chapter, then any such excess shall be paid to the injured employee less the employer's expenses and costs of action.

V.S. 1947, §§ 8076, 8078; P.L. §§ 6509; Dubie v. Cass-Warner Corp., 125 Vt. 476, 477-478 (1966).

It was, obviously, with this law in mind that the following qualifying cause was added to Article XIII:

> 4. Where, on account of injuries of the character described in the preceding paragraphs of this article, either party hereto shall make any payments to injured employees . . . in conformity with . . . the provision of any workman's compensation act . . . such payments shall be construed to be damages within the terms of preceding paragraphs numbered 1 and 2 and shall be paid by the parties hereto accordingly.

App. 12 . (Emphasis added.)

It is important, in construing Article XIII, to place the 1929 contract in perspective as it relates to an employee vis a vis CV and Telco and as it relates to CV vis a vis Telco. The 1929 contract could not be used to take away rights belonging to an employee of either party. See 2 Larson, Workmen's Compensation Law, § 76.41 at 14-326 n.38; Boston & Maine R. R. v. Howard Hardware Co., 123 Vt. 203, 206 (1962). Therefore, in 1929 an injured employee of either company could sue the other company if the employee elected to do so. In such a case, the employee could not be limited to workman's compensation even if the parties contracted with each other that that was all the liability they would incur. On the other hand, as between CV and Telco, they were free to allocate damages for liability in any fashion they chose. Article XIII is the product of such a choice of liability allocation. One would doubt, however, that CV and Telco intended by Article XIII to confer on employees additional rights to compensation not already in existence under the common law as modified by workmen's compensation legislation. It is apparent, however, that the District Court's decision in this action necessarily implied that Telco and CV did intend to confer upon an employee a way around the structure of the then existing workmen's compensation law. This can be demonstrated as follows:

If the accident to David Sharp had occurred under the Workmen's Compensation law as it existed when the subject contract was written, CV could have sued Telco to recover workmen's compensation payments and presumably could have recovered more than the amount of those payments. (Liability is assumed in this example to fall within the terms of Article XIII(1) of the 1929 contract.) In such an event, the excess above compensation paid would have had to be paid the injured employee. V.S. § 8078, supra.

As Judge Oakes held, David Sharp had a cause of action against Telco as a third-party beneficiary to the 1929 contract. App. 32 . Would it not be equally true that Article XIII conferred upon the employee in the above example, the additional right to insist that not only must his employer recover compensation paid to him but also, since the workmen's compensation was only a part of (not "all") the damages (as Judge Oakes construed the contract), that he is entitled to recover the excess through his employers claim against the wrongdoer, Telco? In the absence of Article XIII, the employee could not make such a claim due to the strictures of the law then in effect. Viewing the legal situation in 1929 realistically, then, it is obvious the parties to the contract wished to avoid having to compensate injured employees more than what the law provided. The parties to the contract simply did not wish to place themselves in any other posture. There is absolutely no other reason or purpose for inclusion of Article XIII(4).

In construing the meaning of Article XIII(4) as it relates to XIII(1) and (2), it is imperative that it should be construed in the light of the circumstances surrounding its execution and the intent of the parties when they entered into it. Rhinehart v. Southern Pacific Co., 38 F. Supp. 76, 79 (D.C. Calif. 1941). It must also be assumed that the parties had intended that their obligations relating to indemnity should be construed in light of the law dealing with the subject matter of indemnity at the time of entering into the agreement, in this case, the workmen's compensation law in effect in 1929. Booth-Kelly Lumber Co. v. Southern Pacific Co., supra. This is a well settled law. 4 Williston on Contracts § 615; 17 Am. Jur. 2d Contracts § 257.

As stated in H. P. Hood v. Heins, 124 Vt. 331, 336 (1964), "the language used must be interpreted with reference to the purpose sought to be accomplished and the conditions prevailing at the time the instrument was executed." Again, "[a] contract includes not only what is expressly stated therein, but also what is necessarily implied from the language used." Lapoint v. Dumont Construction Co., 128 Vt. 8, 10 (1969). And the meaning of a "contract must be ascertained from the whole instrument so construed as to give meaning and effect to every part of it that is material." Breding v. Champlain Marine & Realty Co., 106 Vt. 288, 296 (1935). See also Stratton v. Cartmell, 114 Vt. 191, 194 (1945). Here the parties contracted having the Workmen's Compensation Act in mind as demonstrated by the specific language of Article XIII(4) of the April 1, 1929 agreement.

It is submitted that the District Court did not apply these rules of construction but reasoned as follows:

> . . . Here the parties contracted having the Workmen's Compensation Act in mind as demonstrated by the specific language of Article XIII(4) of the April 1, 1929, agreement.
>
> While Article XIII(4) is ambiguously drafted in that it does not state whether workmen's compensation payments shall on the one hand be the only damages within the terms of paragraph 2 or on the other hand be included in paragraph 2 damages, the interpretation of inclusion is the only one which does not nullify paragraph 2. If workmen's compensation were the sole measure of indemnity damages the phrase "liable for all damages for such injuries" (emphasis added) would have no effect since damages from injury can clearly exceed the limits of workman's compensation.
>
> Vermont has always construed the Workmen's Compensation statute in the case of ambiguity in a manner which favors the injured employee, e.g., Herbert v. Layman, 125 Vt. 481, 218 A.2d 706 (1966) (permitting employee to sue his fellow servant as a third party). While the present case in no way affects the employee's rights, recovery on an express

> indemnification basis would coincidentally seem better to place responsibility on the ultimate wrongdoer, at least so far as fault was concerned. In any event these were two substantial corporations, of equal bargaining power, who may be taken to have known what they were doing when they wrote the contract pertaining to joint poles as they did.

It is submitted that not only did the lower Court ignore the terms and the effect of the workmen's compensation in existence in 1929, but its analysis nullifies Article XIII(4), especially as it relates to circumstances where an employee of either company is injured.

As shown above, the drafters of Article XIII were merely taking advantage of the then existing workmen's compensation statute. If Article XIII were intended to make compensation payments only a part of damages under the above-described situation, Telco could be subject to damages in excess of workmen's compensation payments. First such an intention is contrary to the economic considerations one would normally expect between two cooperating utilities and second, if this were intended, Article XIII(4) is meaningless and becomes mere surplusage.

The contractual language referring to equation of workmen's compensation payments to damages applies with equal force and effect to Article XIII(2) as it does to Article XIII(1). There are no words to derive a different intent as to one paragraph as opposed to the other. Therefore, it necessarily follows from the discussion concerning the parties intent as to Article XIII(1) that they intended that Article XIII(2) damages would in no event exceed Article XIII(4) damages, workmen's compensation payments. In short, if the parties to the contract had intended that workmen's compensation payments were equivalent to all damages in XIII(1), it necessarily follows they intended

the same thing with regard to XIII(2).

The construction outlined above is the only one which gives a reasonable meaning to all the provisions of Article XIII and does not "nullify" any particular provision.[3/]

As re-enforcement to the conclusion that the parties intended the opposite result reached by the lower court, reference should be made to the expressed intention of the parties to allocate damages equally where injuries to persons other than employees were incurred for reasons attributable to both parties, regardless of primary or secondary fault concepts. See Article XIII(3) which states:

> 3. Each party shall be liable for one-half (1/2) of all damages for such injuries to persons other than employees of either party . . . that are caused by the concurrent negligence of both parties hereto or that are due to causes which cannot be traced to the sole negligence of the other party.

This is added reason to conclude that Telco and CV did not intend the result reached by the District Court. If the parties felt that damages for concurrent causes (negligence and breach of contract) should be equally born between them for injured persons other than employees, why did they not make a similar provision with respect to injured employees of either? The clear reason for

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3/ Unfortunately, the contract in the day it was written (1929) was not particularly magnaminous to someone in David Sharp's position, but this result was brought about by the stricture of the law which prevented an employee, if an election of workmen's compensation benefits were made, from suing a third party like Telco. The law, fortunately, has changed allowing third-party suits regardless of an election of workmen's compensation, but this fact does not alter the position of the parties to the contract in dispute. None of David Sharp's rights are affected regardless of the outcome of this case.

not doing so, was the workmen's compensation law in effect in 1929 and the parties desire to restrict personal injury liability to workman's compensation payments.

Moreover, if Article XIII(4) was merely intended as a statement that workmen's compensation payments are a form of damages without added significance, why would the terms of paragraph (4) exclude workmen's compensation from the definition of such damages in Article XIII(3)? Would there not be the conceivable circumstance that an employee of neither party to the 1929 contract (e.g. a Rutland Cable TV employee) would be injured, receive workmen's compensation from his employer, and make claim under circumstances falling within paragraph (3)? By saying that workmen's compensation payments are to "be construed to damages within the terms of preceding paragraphs numbered 1 and 2" (but not paragraph numbered 3) negates any intention that paragraph 4 was merely a definitional provison, as the lower court apparently concluded.

In the final analysis, it is extremely difficult to imagine that the draftsmen of Article XIII(4) would have used the language they did, had it been their intention to reach the result reached by the lower court in the case at bar. The phrase "such payments shall be construed to be damages within the terms of the preceding paragraphs numbered 1 and 2" denotes an intention that damages in both instances are synonomous. The words "all damages" in Article XIII(1) and (2) are the terms used for damage liability and, therefore, one must read the term "all" into Article XIII(4). Surely, a contrary meaning would have been spelled out -- for example, in such words as "such payments shall be <u>included</u> as damages." Moreover, were the parties content to merely include

workmen's compensation in damages, it is hard to imagine why Article XIII(4) was included at all.

POINT II

CV IS ENTITLED TO A SETOFF OR CREDIT FOR WORKMEN'S COMPENSATION PAID

Should Telco prevail on the issue posed by Point I, the lower court erred in not providing for an offset of the $8,000 paid to David Sharp as workmen's compensation benefits. The District Court ruled on this issue as follows:

> CV's counterclaim against Telco is dismissed, since CV's negligence was independent of the negligence imputable to it as a result of any conduct by David Sharp and therefore bars recovery under 21 V.S.A. § 624 of compensation paid. See Essick v. City of Lexington, 233 N.C. 600, 65 S.E. 2d 220 (1951); Witt v. Jackson, 57 Cal. 2d 57, 366 P.2d 641, 17 Cal. Rptr. 369 (1961). It is this court's view that the Supreme Court of Vermont would decline to follow the suggestion of Corby v. Workman's Compensation Appeals Board, 22 Cal. App. 3d 447, 99 Cal. Rptr. 242 (1971), that would permit CV to use its compensation paid as an offset to indemnity particularly as Vermont does not believe a wrongdoer should be compensated. See generally Dubie v. Cass-Warner, Corp., 125 Vt. 476, 218 A.2d 694 (1966). In addition, although Article XIII(2) damages, it does not mean that Telco must bear the cost of the workmen's compensation when it is entitled to indemnification. Rather it means that damages to Sharp are $58,000.

Contrary to the court's suggestion that "a wrongdoer should [not] be compensated," CV is merely attempting to keep from paying an amount in excess of damages. The lower court asserted that the damages were $58,000, instead of the $50,000 settlement reached between Telco and David Sharp. There is no rationale to support such a conclusion. Presumably, the $50,000 figure was

a fair estimate of the value of the damages, and subsumed in that figure are $8,000 in compensation payments already made.

In the suit brought by David Sharp against Telco, Telco could not be entitled to a credit for compensation payments made to Sharp by CV. Dubie v. Cass-Warner Corp., supra, at 478. Presumably, Telco was aware of this law, as was the plaintiff Sharp. Under Vermont's Law, with respect to third-party claims, an employer is entitled to reimbursement of amounts paid or payable under the Act. 21 V.S.A. § 624. This was also the law when the 1929 contract went into effect, with respect to subrogated claims. V.S. 1947, § 8078, supra. Knowing this, Telco agreed to hold harmless plaintiff Sharp for reimbursement of the compensation payments to CV. It, therefore, voluntarily undertook to assume responsibility for these payments.

Essick v. City of Lexington, supra, and Witt v. Jackson, supra, ruled upon by the lower court, are clearly in a minority of cases dealing with this subject. For the majority position, see, e.g., White Motor Corp. v. Stewart, 465 F.2d 1085 (10th Cir. 1972); Baker v. Traders & General Ins. Co., 199 F.2d 289 (10th Cir. 1952); Vidrine v. Michigan Millers Mutual Ins. Co., 263 La. 300, 268 So..2d 233 (1972); Cyr v. F. S. Payne Co., 112 F. Supp. 526 (1953); Royal Indemnity Co. v. Southern California Petroleum Corp., 67 N.M. 137, 353 P.2d 358 (1960); Williams Bros. Lumber Co. v. Meisel, 85 Ga. App. 72, 68 S.E.2d 384 (1951); Utley v. Taylor & Gaskin, 305 Michh. 561, 9 N.W.2d 842 (1943); General Box Co. v. Missouri Utilities Co., 331 Mo. 845, 55 S.W.2d 442 (1932); Graham v. City of Lincoln, 106 Neb. 305, 183 N.W. 569 (1921); City of Shreveport v. Southwestern Gas & Electric Co., 145 La. 680, 82 So.

785 (1919); Fidelity & Casualty Co. v. Cedar Valley Electric Co., 187 Iowa 1014, 174 N.W. 7099 (1919); 2 Larson, supra, at § 75.23 at 14-269 n.27.

In the treatise relied upon on several points by the court below, Larson remarks on this issue as follows:

> [T]he better view seems to be that the employer should not be barred by a defense of concurring negligence, when the negligence is only that of a co-employee.

In the case at bar, it was David Sharp's co-employee, the foreman, whose negligence Judge Oakes found to be the "more proximate" cause of Sharp's injuries. In this situation, Larson opines:

> Once this [co-employee negligence] is held firmly in mind, the picture changes in two ways. First, one's moral indignation evaporates, since one no longer has the prospect of a personally guilty plaintiff claiming damages. Second, it becomes even legally inaccurate to speak of the "employer's" negligence in such circumstances, since the employer who assumes compensation coverage is in law not liable for the negligent harms wrought by one employee upon another. It is incorrect to say that the negligence of a co-employee is the employer's negligence, when the injured person is also an employee; the principle of vicarious liability simply does not apply. Thus, if claimant C at the time of the accident was riding in the employer's truck driven by co-employee D, and was injured in a collision caused by the combined negligence of D and a third-party T, one can, of course, say with propriety that, in an action by T against the employer for damages to T himself, the employer is vicariously liable for the negligence of D. But in an action by the employer against T based on C's injuries, one cannot properly say that the injuries were in part imputable to the "employer's" negligence, because, vis-a-vis his employee C, the employer is not vicariously liable for the negligence of D.

Consequently, it is submitted that the lower court clearly misread what the Vermont Supreme Court would hold under similar circumstances.

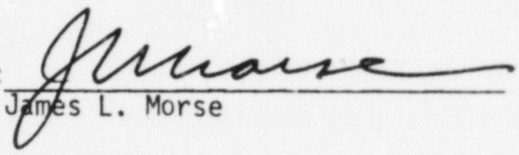
CONCLUSION

For the foregoing reasons, the judgment should be reversed and judgment entered in appellant's favor awarding it attorneys fees and expenses of litigation in the amount of $7,250 plus interest, or, in the alternative, appellant should be allowed a set-off of $8,000 paid to David Sharp in workmen's compensation and the judgment amended accordingly.

Dated: July 23, 1975

Respectfully submitted,

DINSE, ALLEN & ERDMANN

By: 

James L. Morse